STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Whitbeck, C.J., and Jansen and Markey, JJ.

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff/Appellee

VS.

NICHOLAS JACKSON,

Defendant/Appellant
_____/

SUPREME COURT FILE
NO. 125250

COURT OF APPEALS FILE
NO. 242050

OAKLAND COUNTY
NO. 01-177534-FC

THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
Amicus Curiae Brief
IN SUPPORT OF PLAINTIFF/APPELLEE
THE PEOPLE OF THE STATE OF MICHIGAN

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

United States Cases

MICHIGAN CASES

OTHER STATE CASES

Statutes

Other Authorities

Rules

SUMMARY OF ARGUMENTS

With the advent of the United States Supreme Court's decision in *Crawford v. Washington,* whether the admission of hearsay statements violates the U.S. Constitution's 6th Amendment right to confrontations hinges upon whether the offered statements are "testimonial" or not. In accord with *Crawford,* the testimonial hearsay of a non-testifying declarant is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross examine the declarant. The decision in *Crawford* is intended to hew more closely to the intent of the Framers in drafting the 6th Amendment; that is, to curb the abuse of the civil-law mode of criminal practice on display in the trial of Sir Walter Raliegh, and the modern practices closely akin to that practice. The Supreme Court identified those practices, those statements that are testimonial, as prior testimony before a grand jury, preliminary exam or a prior trial, and those statements that are a product of formal interrogation. All of these share certain important characteristics: they are taken by the government, through formal and structured questioning, and in a solemn or formal manner. An excited utterance of the kind in this case, by definition, is not a product of a formal or solemn statement made as a result of structured government questioning; rather it is the antithesis of it. For these reasons, excited utterances are not testimonial.

The second issue is how to determine the admissibility of allegedly false prior accusations of sexual misconduct in a rape case. Prior practice, embodied in *People v. Hackett,* generally allowed a rape victim to be questioned about allegedly false prior allegations, and allowed extrinsic proof of the allegations and their falsity. This rule, sometimes couched in Confrontation Clause terms, is really one of allowing supposed evidence of untruthful character as proof that the victim lied once and is lying in this

case. The practice is not one based on the Constitution but on rape mythology that women and children have a propensity to lie about sexual assaults. The attack thus allowed is a general attack on the credibility of a witness and should be governed by MRE 608's restriction on cross-examination and admission of extrinsic evidence. However, because the practice implicates the same policy considerations driving the rape shield law, similar protections should be in place. The proponent of the evidence must follow the notice and offer of proof requirements from MCL 750.520j. The court must determine from the offer whether the proponent has shown that the allegedly false allegations are in fact probative of untruthful character. A simple showing of falsity is insufficient. If the proponent's offer supports such a finding, the court should hold an in camera hearing to determine whether the allegations alleged by the proponent were in fact made, and are demonstrably false. This means something more than the presence of contradictory evidence. If the proponent is successful in overcoming both heavy burdens, the court may exercise its discretion in deciding if the victim can be cross-examined about the prior allegations, but in no case will extrinsic evidence be permitted.

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to hear this appeal in accord with MCL 770.3(6), 770.12; MCR 7.301(A)(2) and MCR 7.302(G)(3). Defendant-Appellant was convicted by a jury on May 7, 2002. Defendant-Appellant filed an Appeal by Right on June 14, 2003, and his conviction was affirmed in an unpublished Court of Appeals decision, *People v. Jackson,* COA No. 242050.

The Supreme Court granted leave to appeal after oral argument in an order dated April 7, 2005. The parties were directed to include among the issues addressed: (1) whether the admission of the oral and written statements made by Anthony Leroy Hines to the police was error in light of *Crawford v. Washington,* 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and if so, whether *Crawford* should be applied retroactively; (2) whether the trial court erred when it applied the rape-shield statute and denied defendant an opportunity to present testimony regarding his allegations that the complainant had made a prior false allegation of sexual abuse against a different individual; (3) whether alleged prior false allegations constitute "specific instances of the victims sexual conduct" as contemplated by the rape-shield statute; (4) what procedural and evidentiary requirements must be met to prove the allegations are false and for their admission as evidence at trial; and (5) if the trial court did err in excluding or admitting evidence, whether any evidentiary or constitutional errors were harmless. (Order, entered April 7, 2005).

The Court invited the filing of briefs amicus curiae from the Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae joins the Statement of Material Proceedings and Facts of the Plaintiff-Appellee, the People of the State of Michigan.

STATEMENT OF QUESTIONS INVOLVED

I

SHOULD THE CONFRONTATION CLAUSE ANAYLSIS FROM *CRAWFORD V. WASHINGTON* APPLY RETROACTIVELY TO THIS CASE, WHICH WAS PENDING ON DIRECT APPEAL AT THE TIME THE U.S. SUPREME COURT DECIDED *CRAWFORD?*

Amicus Curiae Answers "Yes"

II

WERE THE ORAL STATEMENTS ADMITTED BY THE TRIAL COURT TESTIMONIAL AND THEREFORE ADMITTED IN VIOLATION OF DEFENDANT'S CONFRONTATION CLAUSE RIGHTS, WHERE THE STATEMENTS WERE PROPERLY CHARACTERIZED AS EXCITED UTTERANCES, AND WERE NOT THE PRODUCT OF POLICE INTERROGATION?

Amicus Curiae Answers "No"

III

ARE ALLEGEDLY FALSE ALLEGATIONS OF PRIOR SEXUAL ASSAULTS "SPECIFIC INSTANCES OF THE VICTIMS SEXUAL CONDUCT?"

Amicus Curiae Answers "No"

IV

DID THE TRIAL COURT ERR WHEN IT EXCLUDED EVIDENCE OF ALLEGEDLY FALSE PRIOR ACCUSATIONS OF SEXUAL ASSAULT AGAINST THE COMPLAINANT, WHEN DEFENDANT DID NOT SUBMIT AN APPROPRIATE OFFER OF PROOF, AND WHEN THE ONLY OFFER OF PROOF IS TESTIMONY FROM THE ALLEGED PERPETRATOR OF THE PRIOR ACTS AND HIS RELATIVE, DENYING THE ALLEGED ACTS OCCURRED?

Amicus Curiae Answers "No"

V

IF THE ADMISSION OF HEARSAY EVIDENCE, OR THE EXCLUSION OF THE ALLEGEDLY FALSE ACCUSATIONS, WAS ERROR WERE THOSE ERRORS HARMLESS?

Amicus Curiae Answers "Yes"

ARGUMENT

THE CONFRONTATION CLAUSE ANALYSIS FROM *CRAWFORD V. WASHINGTON* APPLIES ONLY TO THOSE CASES PENDING TRIAL OR ON DIRECT APPEAL

The United States Supreme Court has articulated the general rule that new procedural rules will be applied only to cases pending trial or on direct appeal when the new rule is announced. *Griffith v. Kentucky,* 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987). Accordingly, the new rule announced in *Crawford* applies in this case on direct appeal. In contrast, cases that collaterally attack a final judgment, such as *habeas corpus* petitions in the federal courts, or motions for relief from judgment pursuant to MCR 6.500 in Michigan, would not fall under this general rule unless some exception applied.

The two exceptions to this general rule were set out in *Teague v. Lane,* 489 US 288 (1988). Those two exceptions are: (1) when the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Askanazi v. U.S.,* ___ F. Supp ___ (W.D. Michigan 2005), quoting *Teague* at 311; or (2) when the new rule is a "watershed" rule of criminal procedure. According to *Teague,* a case announces a new rule if the result was not "dictated" by existing precedent." *Teague,* 489 US at 301.

Teague's first exception is not implicated by the *Crawford* decision. Most courts that have considered the matter, have held that *Crawford's* new rule does not fall within the ambit of the second:

> The Supreme Court has "repeatedly emphasized the limited scope of the second *Teague* exception, explaining that it is clearly meant to apply only to a small core of rules requiring observance of those procedures that...are implicit in the concept of ordered liberty." *Beard*[1], 124 S. Ct. at 2513 (quoting *O'Dell,* 521 U.S. at 157). New rules of procedure "merely raise

[1] *Beard v. Banks,* 124 S. Ct. 2504 (2004).

> the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. *Schriro*[2], 124 S. Ct. at 2523. Because of the "more speculative connection to innocence," the Supreme Court gives retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Schriro, 124 S. Ct. at 2523 (quoting *Saffle v. Parks,* 494 U.S. 484, 495 (1990)). "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Schriro,* 124 S. Ct. at 2523 (quoting *Teague,* 489 U.S. at 313) (emphasis in original). According to the Supreme Court, "this class of rules is extremely narrow." *Id.* In fact, the Supreme Court has yet to find a new rule that is "so central to an accurate determination of innocence or guilt," as to fall under the second *Teague* exception. *Beard,*124 S. Ct. at 2513-14. *Askanazi,* ____ F. Supp at ____.

In *Askanazi,* the District Court went on to find "it is clear that the new rule announced in *Crawford* is not one "'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Schriro,* 124 S. Ct. at 2523 (quoting *Teague,* 489 U.S. at 313) (emphasis in original)" *Id.* Accord, *Mungo v. Duncan,* 393 F.3d 327 (CA 2, 2004); *Colorado v. Edward,* No. 02CA2487 (Colo. COA, July 15, 2004). *Contra, Bockting v. Bayer,* 408 F.3d 1127 (CA 9, 2005).

II

THE ORAL STATEMENTS OF DECLARANT TONY HINES ARE NOT TESTIMONIAL AND THEIR ADMISSION DID NOT VIOLATE DEFENDANT'S RIGHT OF CONFRONTATION

A. The holding in *Crawford v. Washington*

To say that the 6th Amendment's jurisprudential landscape was rocked by the United States Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354; 158 L.Ed2d 177 (2004) is understatement akin to saying Krakatoa went poof. Probably well over 1,000 state and federal cases have decided Confrontation Clause issues, or at least mentioned them, since *Crawford* was decided. This is quite a statistic

[2] *Schriro v. Summerlin,* 124 S. Ct. 2519 (2004)

for a case with a holding deceptively simple to articulate: Admission of "testimonial" hearsay of a non-testifying declarant violates the 6th Amendment unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

The Court began, as it were, in the beginning, by setting out the two extremes of definition of the Amendment's phrase "witness against." On one end is the notion one could "plausibly read 'witnesses against' a defendant to mean those who actually testify at trial." *Crawford,* 124 S.Ct. at 1359 (citations omitted). On the other end is the idea that "witness against" means "those whose statements are offered at trial" apart from whether the declarant actually testifies. *Crawford,* 124 S.Ct. at 1359 (citations omitted). To understand the meaning of the phrase as used in the Amendment, to understand whether the Clause fits one of the extremes or falls somewhere in the middle, the Court turned to the historical background of the Clause.

English common law, and our system based upon it, has long favored live testimony by witnesses in open court, subject to adversarial testing by cross-examination. *Crawford,* 124 S.Ct. at 1359. This is in contrast to the system that emerged in continental Europe of civil law examinations by judicial officers in private. *Crawford,* 124 S.Ct. at 1359 (citations omitted).

Nevertheless, as the Court noted, England occasionally adopted parts of the continental civil law practice, and examinations by Justices of the Peace were at times read in court in lieu of live testimony. *Crawford,* 124 S.Ct. at 1359 (citations omitted).

> Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555). These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the

> Renaissance 21-34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528-530.

Crawford, 124 S.Ct. at 1360.

The Court went on to explore the "most notorious" example of using the civil-law examination: the trial of Sir Walter Raleigh. Raleigh was tried for treason. The evidence against him consisted of his alleged accomplice's, Lord Cobham's, testimony before the Privy Council and a letter of Cobham's. Cobham did not testify, despite Raleigh's repeated insistence that Cobham be brought to court where he could be cross examined and shown to be a liar saving his own skin. Raleigh was convicted and sentenced to death.

Raleigh's conviction was decried by one of the trial judges, and reform of English law followed: Subsequent treason charges required witnesses to confront the accused traitor; unavailability was demanded before examinations would be admitted at trial; and, an English version of the *Bruton*[3] rule was created.

As a result of this historical exegesis, the Court set forth what are the core principals of the Confrontation Clause:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Crawford, 124 S.Ct. at 1364.

.....

[3] *U.S. v. Bruton*, 391 U.S. 123; 88 S.Ct. 1620 (1968).

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> ....
>
> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U. S. 237, 243 (1895); cf. *Houser*, 26 Mo., at 433-435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.

Crawford, 124 S.Ct. at 1365.

Thus the deceptively simple holding that where that acute concern for a specific type of out of court statement arises, that is, where "testimonial" hearsay is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford, id.* At 1374.

B. Searching for the meaning of "testimonial."

The Court was not altogether helpful when it left the definition of testimonial to another day, a day which has plainly arrived. However, we are not left disarmed in our

efforts to flesh out which statements are testimonial and which are not. The Court itself found that "at a minimum" prior testimony at a preliminary exam, before a grand jury, or at a former trial were testimonial[4]; these three (and one other to be discussed later) bear the "closest kinship to the abuses at which the Confrontation Clause was directed."

It is good to ask here what aspects make up that kinship? In what ways do these three things resemble the English practice of examination by a magistrate? All are formal or solemn proceedings, at which structured questioning is used to elicit a response, made, of course, to government agents or officials. The meat of the testimonial nut is in these three things.

Support for the argument that testimonial statements are those that are acquired by structured questioning, in a formal or solemn manner, and only to government agents or officials is found within the words of *Crawford.*

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "**Testimony,**" in turn, is typically "**[a] solemn declaration or affirmation** made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a **formal statement to government officers bears testimony** in a sense that a person who makes a casual remark to an acquaintance does not.

Crawford, 124 S.Ct. at 1364.

C. Police interrogation in the "Colloquial" sense.

The fourth class of statements that are testimonial are those made in response to police interrogation. Again, the question to be asked is how does police interrogation "bear a striking resemblance to examinations by justices of the peace?" In the body of

[4] These are, of course, the low hanging fruit of what is testimonial. No one would argue that what happens at all three, with witnesses being "called to testify," and taking an oath to tell the truth, and answering questions (usually) from lawyers, all designed to reach some conclusion by judge or jury as to the facts, is anything other than testimony.

the decision, Justice Scalia spends several paragraphs explaining how the differences between the two, if any, are of no consequence[5]. He saves the real explanation for a footnote:

> We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island* v. *Innis,* 446 U. S. 291, 300-301 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

Crawford, 124 S.Ct. at 1365, note 4.

Including police interrogation is entirely consistent with the first three "core classes" of statements: the statement is given to a government agent, in response to structured questioning, and with a high degree of formality. Additionally, "[o]ne of its reasons for holding that a statement taken in the course of a police interrogation is testimonial was that 'involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse'...and '[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.'" *People v. Cage,* 15 Cal. Rptr. 3d 846, 854-855; 120 Cal.App4th 770 (Cal. Ct. App 2004) review granted, 99 P.3d 2 (Cal. Oct. 13, 2004).

Webster's New World Dictionary, (2d College Edition, 1976) defines "interrogate" as "to ask questions formally in examining." *Websters New Collegiate Dictionary* (1975) defines the word as "to question formally and systematically." "Interrogation" is exactly what Sylvia Crawford went through. Sylvia's husband had

[5] Justice Scalia notes that not all examinations by justices of the peace in England were made under oath, and that examinations under the Marian bail statutes were done by Justices of the Peace who were closer in function to today's professional police force than modern day magistrates.

been arrested; she was brought to the station house, or at least was there because of a request by police; she was given *Miranda* warnings; she was interrogated twice, and her responses were audiotaped.

D. The trouble with "abstractions."

Courts have gone astray from these core classes of testimonial statements when they have misread the *Crawford* decision to include three "tests" for what is testimonial. The troublesome words from the decision are these:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (*Thomas, J.*, joined by *Scalia, J.*, concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition--for example, *ex parte* testimony at a preliminary hearing.

Crawford, 124 S.Ct. at 1364

These are not three additional definitions of testimonial hearsay, nor are they "tests" endorsed by the Court, with directions to lower courts to judge all future hearsay statements against the yardstick of whether they were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." The California Appellate Court got it just right, in amicus' view, when it said:

> In any event, *Crawford* did not adopt any of these formulations. It merely noted that they "exist," that they "share a common nucleus," and that certain indisputably testimonial statements fall within that nucleus. (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.) The court's actual holding – that statements made in response to police interrogation are testimonial – was far narrower. So was its rational, which turned on the "investigative and prosecutorial function" performed by both justices of the peace and police. (*Id.* at p. 1365.)

Cage, 15 Cal. Rptr. 3d at 855.

The Court expressly **refused** any "effort to spell out a comprehensive definition of what is 'testimonial.'" The sole holding regarding what is testimonial is that, at a minimum, the Confrontation Clause applies to prior testimony at prelim, grand jury or former trial, and to police interrogations, because these are the practices with "closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford,* 124 S.Ct. at 1374.

In addition to ignoring the clear holding of *Crawford,* engaging in the exercise proves the "test" unworkable; an outcome as much as predicted by Justices Thomas and Scalia in *White v. Illinois,* 502 U.S. 346; 112 S.Ct. 736; 116 L.Ed.2d 848 (1992). In *White,* the United States suggested in an amicus brief that the scope of the Confrontation Clause should be limited to trial by ex parte affidavit. The majority rejected this view as a too narrow and crabbed conception of the Confrontation Clause's scope; and one that eliminates the Clause's role in restricting hearsay testimony. *White, id* at 740-741. However, Justice Thomas did take up the matter and wrote, using language that infuses the *Crawford* decision, that the position espoused by the United States then was perhaps more in keeping with the actual intent of the 6th Amendment. But in the predictive passage, Justice Thomas urged caution in accepting any view that the Confrontation Clause applied to statements made in "contemplation of legal proceedings."

> If not carefully formulated, however, this approach might be difficult to apply and might develop in a manner not entirely consistent with the crucial "witness against him" phrase.
>
> In this case, for example, the victim's statements to the investigating police officer might be considered the functional equivalent of in-court testimony because the statements arguably were made in contemplation of legal proceedings. Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse). It is also not clear under the United States' approach whether the declarant or the listener (or both) must be contemplating legal proceedings.

White, 112 S.Ct at 747, J. Thomas, conc.

That Justice Thomas's fears have come to pass is clear when one reviews the various court decisions that have tried to apply the poorly formulated "available for use at later trial test." This un-careful formulation has lead to results that have been unpredictable, sometimes Pickwickian, and often to the directly opposite effect of that intended by Justices Thomas and Scalia: the scope of the Confrontation Clause is not narrowed; rather, it is expanded beyond "the historical evil to which it was directed." *White,* 112 S.Ct at 747, J. Thomas, conc.

E. How lost are we?

Reviewing various cases that have struggled with this new jurisprudence will show us just how far astray from the core principles some courts have gone. But first, a little background on the language "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

The quote is from the amicus brief of the National Association of Criminal Defense lawyers. In its brief the Association attributes this conception of what is "testimonial" to Prof. Richard Friedman. While objective on its face, the NACDL's amicus brief makes it clear that it is subjective in its application; that is, in some cases what is in the mind of the declarant will determine whether the statement is testimonial or not.

> By and large, statements made to law enforcement officials about a crime will be testimonial. And by and large, statements made to friends, relatives, accomplices or anyone outside of criminal justice system will not be testimonial.
>
> There will be exceptions to these broad and general rules, of course. A witness to a crime may make a statement to a friend knowing that the friend will subsequently contact police. Such a statement is aimed at law enforcement and would therefore be testimonial. And calls to 911 call for some judgment in the application of the testimonial approach. Friedman & McCormack, *supra* at 1224-25. That is because 911 serves a dual role in our society. It is both a component of our law enforcement system (suggesting that statements to 911 are testimonial) and an emergency response system (suggesting that statements to 911 are not testimonial). Whether a particular statement made to a 911 dispatcher was testimonial would depend on which capacity the caller was using when contacting the system.

Motion and Brief of Amici Curiae National Association of Criminal Defense Lawyers, American Civil Liberties Union and the ACLU of Washington State, July 24, 2003, p. 25.

The NACDL plainly invites precisely the thing that Justice Thomas warned against: entangling the courts in a multitude of problems deciding when statements were made in contemplation of legal proceedings. Moreover, it expands the reach of the Confrontation Clause by expanding the concept of "witness against" beyond that core class of statements to virtually any statement that mentions criminal activity, chucking in

the dustbin the holding of *Crawford* requiring government involvement, formality, solemnity and interrogation.

In large measure the confusion begins in *People v. Cortes,* 781 N.Y.S.2d 401 (NY Sup.Ct 2004). In this case, the New York Supreme Court found that a 911 call from an unnamed and un-located witness, describing an attempted murder and the perpetrator, which description was in response to questions by the 911 operator, was testimonial and therefore inadmissible. The issue as the New York court saw it was whether the statements were made in the course of a police interrogation. After reviewing several dictionary definitions of "interrogation," the court reviewed several police agency websites that describe for the public how to report a crime using the 911 system. From this the Court concludes:

> *Crawford* refers to "formal" statements. *124 S. Ct. at 1364.* The procedures in connection with the 911 calls meet the definition of formal. They follow established procedures, rules, and patterns of information collection; they are conducted in due form. See *Webster's Third New International Dictionary* (1986). There is a regularized routine to the 911 calls in which crimes are reported. The transcript of this call shows the information was elicited in a particular way and order and that the operator was asking questions in the accepted pattern.

Cortes, id at 406.

On the issue of the "reasonable belief" test, the Court concluded:

> The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute. Like the victims and witnesses before the King's courts an objective reasonable person knows that when he or she reports a crime the statement will be used in an **investigation** and at proceedings relating to a prosecution.

Id. at 415 (emphasis added).

Recall that the portion of the *Crawford* decision that mentions the "reasonable belief" test *does not mention investigation, but only use at later* ***trial.***[6] The major proponent of this view is Prof. Richard Friedman. Indeed, the *Cortes* Court cites Prof. Friedman when it sets out the "test" it intends to follow.[7] More to the point, the Court simply decides without evidence that every person is likely to know that the police will use the statements in some way, and then determines that it makes no difference what the caller believes.

While the New York court was not bothered by this inconsistency, this Court should be. It is tempting to dismiss *Cortes* as an aberration, were it not for a number of other cases that have trod a similar path. Notably, in *U.S. v. Cromer,* 389 F.3d 662 (CA 6, 2004), deciding the admissibility of a confidential informant's statements to police, the 6th Circuit took the next logical step and explicitly adopted Prof. Friedman's definition of what is testimonial.

> Professor Friedman, in contrast, urges a broader definition of "testimonial" that would include any statement "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime." Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1240-41 (2002). Based on his proposed definition, Friedman offers five rules of thumb:
>
> > A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is

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[6] "[s]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 124 S.Ct. at 1364

[7] "This test appears to have been later modified by its author to include an objective state of mind rather than the declarant's subjective mind set. The revised test states that a pre-trial statement is inadmissible without cross-examination if the circumstances would lead a reasonable person to realize that the statement is likely to be used in investigation or prosecution of a crime. Friedman & McCormack, *Dial-In Testimony, 150 U. Pa. L. Rev. at 1241.*" *Cortes,* 781 N.Y.S.2d at 414.

> made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.
>
> Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1042-43 (1998) [hereinafter Friedman, *Confrontation*].

Cromer, 389 F.3d at 673-674.

Cromer's explicit adoption of Prof. Friedman's definition of what is testimonial expands the universe of testimonial statements to include literally all statements made to police and most made to others; in other words, the Confrontation Clause bars the admission of any relevant hearsay statement the prosecution would care to offer. It cannot be gainsaid that there is no support in the holding of *Crawford* for such an expansive view of what is testimonial.

Moreover, the *Cromer* Court and Prof. Friedman, prove themselves to be out of touch with reality in arguing for this expansive view. The Court claims that a greater danger exists if the hearsay offered is a statement volunteered to police rather than one garnered through formalized police interrogation.[8]

> One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation. Professor Friedman's concern becomes especially meaningful in such a context. If the judicial system only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally.

Cromer, 389 F.3d at 675.

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[8] It is remarkable that Justice Scalia, writing for the U.S. Supreme Court, did not see this danger; in fact, he plainly held just the opposite.

In the accompanying footnote, the Court cites Prof. Friedman's example of a private rape counselor who is able to assure a victim that she may give a videotaped statement, not under oath, that will be given to prosecutors and used against the perpetrator with little risk that she will have to testify. This all begs the question: in what jurisdiction would statements like this be allowed in trial? In Michigan such a videotaped statement would not be allowed. Having adopted Prof. Friedman's concept of testimonial over the holding of the U.S. Supreme Court, the 6th District compounds its error by supporting its ruling with Prof. Friedman's strawman.

The triumph of this misreading of *Crawford* reaches its zenith, or perhaps more accurately its nadir, in *United States v. Arnold,* 410 F.3d 895 (CA 6, 2005). In *Arnold,* the 6th Circuit considered three hearsay statements of an unavailable witness: a 911 tape, statements by the victim to police immediately after their arrival on the scene, and a statement, "That's him!" made by the victim when defendant arrived on the scene. The Court first ruled that the foundation to admit the first two statements as excited utterances had not been met, but had as to the third. The Court went on to decide, unnecessarily in amicus' view, whether the statements were testimonial.

All three statements were testimonial, in the Court's view, because first and foremost they were made to government agents. Second, and citing *Cromer,* the declarant could reasonably expect her statements to be used to prosecute the defendant because she was the only witness to the crime. In one stroke the 6th Circuit has dispensed with *Crawford's* requirement that statements be made in response to police interrogation, or that they be accompanied by some formality and solemnity, while at the same time elevating to dispositive the requirement that they be made to police officers.

This Court should not follow the lead of these cases. The "reasonable belief test" is not the holding in *Crawford*, expands the coverage of the Confrontation Clause to any "accusatory" hearsay statement in direct opposition to the *Crawford* analysis, and is unworkable in application. This Court's decision should stay firmly rooted in *Crawford's* ruling: that is, a statement is testimonial only if; 1) it is made to a government official; 2) a result of formal and structured question; 3) and, in a formal or solemn manner.

F. The Confrontation Clause and Excited Utterances

Crawford mentions excited utterances only once, in footnote 8:

> One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White* v. *Illinois,* 502 U. S. 346 (1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.*, at 349-351. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U. S., at 348-349. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given ... that the testimony properly falls within the relevant hearsay exceptions."

Crawford, 124 S.Ct. at 351, n. 4.

The defendant/appellant uses a part of this footnote to argue that the spontaneous declaration exception did not exist in 1791, and thus admission of spontaneous statements under the rule violates the Confrontation Clause. This assertion, of course, is belied by

the part of the footnote not quoted in his brief, which cites a case relying on the rule decided nearly 100 years before 1791. What the footnote does do is betray some unease with the admissibility of the statements admitted in *White,* and in doing that reinforces that the declarant must be unavailable before testimonial hearsay will be admitted.

Because excited utterances are not prior testimony, the issue can only arise in cases where the statements are made to police or other government agents (if not, they are outside the Confrontation Clause's purview) and only if they are the product of police interrogation. The cases have arisen most frequently in three ways: statements made to 911 operators, to police at the scene of a crime, and to police at the station house when the declarant arrives there without appointment. Some courts have hinted that hearsay statements that qualify for admission under 803(2) are by their very nature non-testimonial. Others have chosen a more nuanced approach, parsing out their own definition of interrogation and placing the facts somewhere within that definition. The latter method suggests that some statements made to police, though still qualifying for admission as excited utterances, are the product of interrogation. Amicus submits that the two views are not entirely incompatible, once it is understood that the set of statements that are at once admissible as excited utterances and the product of interrogation is exceedingly small.

A good example of how courts have tried to reach a definition of interrogation is *Stancil v. United States,* 866 A.2d 799 (DC Ct. of App., 2005). The evidence against Stancil consisted entirely of the testimony of the police officer who responded to a 911 call. The officer testified that she was dispatched to the scene after the dispatcher received a 911 call from an unidentified caller saying there was a disturbance at the

residence. When the officer arrived, she saw defendant and the victim, his wife, standing about six feet apart. Between them stood their daughter, Mia, pointing a steak knife at the defendant screaming, "stop hurting my mommy, stop hurting my mommy, I'm not going to let you hurt mommy any more." After the officer got Mia to drop the knife, and within a minute of her arrival, the officer spoke to the victim, who described a vicious assault by the defendant. The victim did not testify. The defendant objected to the officer's testimony on hearsay grounds and because the victim "should be here to testify today." On appeal, the defendant gave up his hearsay objection and focused solely on the Confrontation Clause objection.

In its decision, the DC Court correctly asks the question: are the statements at issue a product of police interrogation? Before reaching the question, however, the Court first dispenses the with the defense argument that the government is "fixated" on a non-existent formality requirement; the argument of Prof. Friedman discussed above.

> In *Crawford*, the Supreme Court found it "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought [sic] trial by *unsworn ex parte* affidavit perfectly OK." *Crawford, 124 S. Ct. at 1365 n.3*. Indeed, we do not understand the government to be arguing the contrary. Nevertheless, we think that PDS' attempt to apply the quotation from the Friedman and McCormack article to [*31] the present controversy is less than convincing. After all, the *Confrontation Clause* is not the *only* safeguard against the admission of out-of court statements. Unless such statements fall within a recognized hearsay exception, they continue to be inadmissible, and *Crawford* did nothing to undermine the protections provided to criminal defendants by the law of evidence. The parade of horribles conjured up in the Friedman-McCormack passage consists of the most rank hearsay. Unless the prosecution could show, *e.g.*, that an unsigned writing, or an anonymous telephone call, constituted an excited utterance or fell with some other hearsay exception - a very difficult showing in some of the cited examples - the out-of-court statement would be inadmissible. The requirement of some level of structure or formality, as advocated by the government, is consistent with *Crawford*, and we do not believe that PDS has established that such a requirement is an absurd fixation.

Stancil, 866 A.2d at 810.

The Court next must deal with the argument that there is no need to show that the offered statements were a result of police interrogation; rather, all accusatory statements no matter how or to whom they are made, are covered by the Confrontation Clause.

> In *Crawford*, however, as we have previously noted, the Court explicitly distinguished between a "formal statement to [a] government officer[]" and "a casual remark to an acquaintance," and at least implied that the former is testimonial while the latter is not. *124 S. Ct. at 1364.* Further, although the Court stated that the term "testimonial" applies "at a minimum" to prior testimony and to police interrogations, *id. at 1374*, it is unlikely that the Court intended the term to embrace contacts with the police that do not amount to interrogations.

Stancil, 866 A.2d at 811.

On the other hand, the DC Court did not wholly adopt the government's argument that excited utterances are by their nature non-testimonial. Rather, the Court relied on a California case, *People v. Kilday,* 123 Cal. App. 4th 406, 20 Cal.Rptr. 3d 161, 165, 173-74 (Cal. Ct. App. 1st Dist. 2004), to find that that "statements made to police officers while they are "securing the scene" often are not testimonial. However, once the scene has been secured, and once the officers' attention has turned to investigation and fact-gathering, statements made by those on the scene, in response to police questioning, tend in greater measure to take on a testimonial character, and they are thus ordinarily inadmissible under the *Confrontation Clause* in the absence of a prior opportunity for cross-examination." *Id.* at 813. In the end, the Court could not come to a conclusion, finding that there were facts supporting both positions. Ultimately, the case was remanded for further fact finding.

Similarly, in *People v. Cage,* 15 Cal. Rptr. 3d 846; 120 Cal.App4th 770 (Cal. Ct. App 2004) *review granted,* 99 P.3d 2 (Cal. Oct. 13, 2004), the prosecutor admitted statements made to a police officer, in response to the question "What happened between you and your mom (the defendant)." The statement was made at the hospital, before the victim was treated for a large gash in his neck. Relying on *Crawford's* perceived concern with statements made in relatively formal proceeding which contemplate a future trial, the Court said:

> We cannot believe that the framers would have seen a "striking resemblance" between Deputy Mullin's interview with John at the hospital and a justice of the peace's pretrial examination. There was no particular formality to the proceedings. Deputy Mullin was still trying to determine whether a crime had been committed and, if so, by whom. No suspect was under arrest; no trial was contemplated. Deputy Mullin did not summon John to a courtroom or a station house; he sought him out, at a neutral, public place. There was no "structured questioning," just an open-ended invitation for John to tell his story. The interview was not recorded. There is no evidence that Deputy Mullin even so much as recorded it later in a police report. Police questioning is not necessarily police interrogation. When people refer to a "police interrogation," however colloquially, they have in mind something far more formal and focused.

Cage, Id. at 784

In a case with remarkable parallels to this one, *State v. Barnes,* 854 A.2d 208 (Me. Sup. Jud. Ct. 2004), the deceased victim's prior statements to police after defendant assaulted her before her murder were not testimonial even though given to police who asked questions of her. The victim went to the police station after the defendant assaulted her, and told the police what happened. The Court relied on a number of factors to decide that the hearsay was not testimonial:

> First, the police did not seek her out. She went to the police station on her own, not at the demand or request of the police. Second, her statements to them were made when she was still under the stress of the alleged assault.

> Any questions posed to her by the police were presented in the context of determining why she was distressed. Third, she was not responding to tactically structured police questioning as in *Crawford*, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity and did not have reason, until her own statements were made, to believe that a person or persons had been involved in any specific wrongdoing. Considering all of these facts in their context, we conclude that interaction between Barnes's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause as interpreted by the Court in *Crawford*."

Barnes, id. at 211.

The more correct view, and the one this Court should adopt, is that excited utterances are by their nature non-testimonial. As near as can be told, one of the first cases that came to this view is *Hammon v. State,* 809 N.E.2d 945 (Ind. App, 2004) *aff'd* 929 N.E.2d 444 (Ind. 2005). Peru police officer Jason Mooney was dispatched to a residence in Peru, where he found the victim identified as A.H. Officer Mooney thought A.H. looked frightened, but said "no" when he asked if there was a problem at the residence. When Officer Mooney went into the residence he saw that the living room was in a state of disarray. The defendant admitted there had been an argument, but denied that there was any battery. Once A.H. was separated from the defendant, however, she told Officer Mooney that defendant had thrown her down and punched her. During the time they were speaking, defendant made several attempts to enter the room, and when he did A.H. became quiet and afraid.

At defendant's bench trial, A.H. did not testify, but Officer Mooney did. The court admitted the officer's testimony about what A.H. said under the excited utterance exception. The defendant was convicted, and he appealed arguing that the statements made to Officer Mooney did not qualify as excited utterances as they were in response to

questions from the officer, and arguing that admission violated his 6th Amendment right to confrontation.

The Indiana court first held that the A.H.'s statements were not the product of police interrogation:

> The closer question is whether A.H.'s statement was produced during the course of a police "interrogation." Admittedly, A.H. gave her statement in direct response to questioning by Officer Mooney. However, we observe that the Supreme Court chose not to say that any police questioning of a witness would make any statement given in response thereto "testimonial"; rather, it expressly limited its holding to police "interrogation." We conclude this choice of words clearly indicates that police "interrogation" is not the same as, and is much narrower than, police "questioning." To the extent the Supreme Court said that it used the term "interrogation" "in its colloquial . . . sense," we believe that reference to a lay dictionary for a definition of "interrogation" is appropriate. Id. at --, 124 S. Ct. at 1365 n.4. "Interrogation" is defined in one common English dictionary as "To examine by questioning formally or officially." The American Heritage College Dictionary 711 (3d ed. 2000). This is consistent with our prior observation that the common characteristic of all "testimonial" statements is the formality by which they are produced. We also believe that "interrogation" carries with it a connotation of an at least slightly adversarial setting. See Roget's Thesaurus II 556 (Expanded ed. 1988) (listing as first definition of "interrogate" as "To question thoroughly and relentlessly to verify facts: interrogate the captured soldier.").
>
> We thus hold that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not "testimonial." Whatever else police "interrogation" might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police "interrogation," bolstered by television, as encompassing an "interview" in a room at the stationhouse. It also does not bear the hallmarks of an improper "inquisitorial practice." See Crawford, -- U.S. at --, 124 S. Ct. at 1364. Thus, we conclude that Officer Mooney's questioning of A.H. at her residence shortly after the incident occurred does not qualify as "police interrogation" and A.H.'s statements at that time were not "testimonial." The new rule announced in Crawford does not affect their admissibility.

Hammon, 809 N.E.2d 952.

Had it ended there, this decision would be in keeping with those after it, like *Stancil* and *Cage,* that set about defining the extent of "interrogation." However, the Indiana court went further, calling in to question whether excited utterances could ever be testimonial:

> We further note that the very concept of an "excited utterance" is such that it is difficult to perceive how such a statement could ever be "testimonial." "The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful." Hardiman v. State, 726 N.E.2d 1201, 1204 (Ind. 2000). To be admissible, an excited utterance "must be unrehearsed and made while still under the stress of excitement from the startling event." Id. "The heart of the inquiry is whether the declarants had the time for reflection and deliberation." Id. An unrehearsed statement made without time for reflection or deliberation, as required to be an "excited utterance," is not "testimonial" in that such a statement, by definition, has not been made in contemplation of its use in a future trial. See Crawford, -- U.S. at --, 124 S. Ct. at 1364. We hold, given the nature of the police questioning in this case and nature of the statement itself, that A.H.'s statement to Officer Mooney was "non-testimonial" and admissible as evidence against Hammon, notwithstanding Crawford and Hammon's apparent lack of an opportunity to cross-examine A.H. regarding her statement.

Hammon, Id. at 952-953.

The idea that excited utterances, by their very nature, are outside the Confrontation Clause's phrase "witness against" did not originate with the Indiana Appellate Court. Michael Crawford's counsel at oral argument before the Supreme Court was asked to address the issue by the Chief Justice.

> QUESTION: Well, then how about a spontaneous declaration?
>
> MR. FISHER: Well, that's the kind of a thing that's traditional hearsay. It's outside of the scope of the phrase witness against. It's outside of the scope of the testimonial approach.
>
> QUESTION: So it would come in under your system?

> MR. FISHER: An excited utterance comes out the same way under –
>
> QUESTION: Without -- without having to show unavailability.
>
> MR. FISHER: Right. It's just purely a hearsay question, Justice -- Chief Justice Rehnquist.

Transcipt of Oral Argument Before the Supreme Court, p. 20-21.

This view has been adopted by some courts, and rejected by others. Indeed, the Indiana Supreme Court affirmed the admission of A.H.'s statements to police, but expressly rejected the notion that statements that qualify as excited utterances are non-testimonial. In doing so, however, the Indiana Supreme Court focused not on whether the statement was a product of interrogation, but on the motives of those involved.

> After considering the views of the Court of Appeals and the courts of other jurisdictions, we conclude that a "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motivation of the individual taking the statement or the objectively evaluated purpose of the procedure is sufficient.

Hammon v. State, 929 N.E.2d 444 at 456 (Ind. 2005).

This "test" is nothing more than the wolf of "reasonable belief" in sheep's clothing. It expressly directs the attention to the subjective expectation of both the declarant and the hearer. It ignores the objective circumstances of the making of the statement, the formality, solemnity and even whether the statement is made to a government agent. It flies in the face of Justice Thomas's warning that "[a]ttempts to

draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties."

F. Whither now, Excited Utterances? A conclusion.

At first blush, it seems that there is an irreconcilable conflict. A first, and necessary step, to deciding this and future cases is to reject, root and branch, the notion that a statement's character as testimonial hinges upon the subjective or objective "reasonable belief" that it will be used at a latter trial, much less investigation. Simply, that is not the law.

A second step is to determine whether an offered statement is a product of police interrogation. In defining what constitutes police interrogation, this Court should clearly state what are the hallmarks of testimonial statements: government involvement, formality, solemnity and structured questioning. The Court would do well to keep in mind what Judge Sutton said in his dissent to *Arnold:*

> As in this case, a 911 call generally will be a plea for help, not an effort to establish a record for future prosecution. A 911 call represents a backward-looking response to an emergency that has already occurred or a contemporaneous response to an emergency that is occurring, not a forward-looking statement about a criminal prosecution that may or may not occur. Such calls also bear poor analogies to the kinds of testimonial statements that the Court has said will traditionally qualify—"affidavits, depositions, prior testimony, or confessions," *id.* at 51–52. Add to these considerations the following realities— that the call is frequently made in the context of real or perceived emergencies, that the call is frequently answered by operators who are not employed by law enforcement and that when the call is answered by law enforcement personnel that fact is by no means clear to the caller—and it seems to me that the 911 call that qualifies as testimonial evidence will be the exception, not the rule.
>
> In considering this issue, I cannot resist commenting on the nexus between the "excited utterance" inquiry and the "testimonial" inquiry. When a district court finds that a 911 call "relate[s] to a startling event or condition made while the declarant was under the stress of excitement caused

> by the event or condition"—when in other words the trial judge finds that the call qualifies as an excited utterance under Rule 803(2) of the Federal Rules of Evidence—it often would seem to be the case that the call is not testimonial in nature. It is very difficult to imagine a "solemn" excited utterance or even a semi-solemn excited utterance. Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a "solemn declaration . . . ," *Crawford*, 541 U.S. at 51) or to agreed-upon forms of testimonial evidence ("affidavits, depositions, prior testimony, or confessions," *id.* at 51–52) would seem to depart from the prerequisites for establishing an excited utterance. To respect the one set of requirements would seem to disrespect the other. In the end, the number of "solemn" statements that also happen to "relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be something approaching a null set.

Arnold, 410 F.3d at 913-915, J. Sutton dissenting.

A rigorous application of the *Crawford* holding, that the Confrontation Clause is concerned only with statements to governmental officials, resulting from formal and systematic questioning, and given in a solemn, deliberate way, leads to the ineluctable conclusion that most, if not all, statements that qualify as excited utterances are not testimonial. This is certainly true in the case before the court.

There should be little doubt that when Tony Hines walked in on his nine-year-old son fellating the defendant he experienced a startling event. When Tony Hines arrived unexpectedly and without invitation at the Waterford Police Department some five and a half hours later, he was still emotional, crying and having a hard time speaking. The record is devoid of any indication that the police officer who was listening to Tony engaged in any formal, solemn and tactically structured questioning. Indeed, there's no indication that he asked any questions at all. At the time that Tony Hines said what happened, the Waterford Police were not investigating a crime, were not questioning him regarding known criminal activity and did not have reason, until his own statements were

made, to believe that the defendant, or anyone else, had been involved in any specific wrongdoing; they had no idea if a crime had been committed. The officer was in a sense witnessing an event, which is what an excited utterance truly is. In short, Tony Hines's oral statement to the police was not testimonial, and therefore without the purview of the Confrontation Clause. It was appropriate and within the trial court's discretion to admit the statement as an exited utterance.

The Appellee conceded in its supplemental response to appellant's application for leave, that Tony Hines's written statement is inadmissible in light of *Crawford.* This Court should accept that concession, as the written statement is far more likely to be testimonial. There is little evidence in the record of Tony Hines's emotional state at the time of the writing of his statement. Assuming, *arguendo,* that he had calmed and was no longer under the stress of the event, the writing cannot be fairly characterized as an excited utterance. It is, therefore, more likely to be testimonial. Additionally, one who sets pen to paper, presumably at the request of the police officers, is undertaking a far more solemn and formal act, more akin to the early abuses the Confrontation Clause is intended to guard against, than is one who makes an excited utterance to police.

Violations of the Confrontation Clause are non-structural, Constitutional errors reviewed under the harmless beyond a reasonable doubt standard. *People v. Shepherd,* 472 Mich 343 (2005). The written statement was merely a repetition of Tony Hines's properly admitted, non-testimonial excited utterance. Moreover, other competent evidence, including the admissions of defendant, was admitted at trial. Where, as here, there was considerable competent evidence showing the same facts, and proving guilt,

any error in admission is harmless beyond a reasonable doubt. *People v. Anderson,* 446 Mich 392 (1994).

ALLEGEDLY FALSE ALLEGATIONS OF SEXUAL ASSAULT MADE BY A VICTIM OF CRIMINAL SEXUAL CONDUCT ARE INADMISSIBLE UNLESS THE PRIOR ALLEGATIONS ARE SHOWN TO BE DEMONSTRABLY FALSE BY ADMISSION OF THE VICTIM; IN THAT EVENT, INQUIRY BY CROSS-EXAMINATION MAY BE ALLOWED AT THE DISCRETION OF THE TRIAL JUDGE BUT PROOF BY EXTRINSIC EVIDENCE IS FORBIDDEN.

A. A Rule Based on Mythology

In deciding where to go with admission of allegedly false allegations of sexual assault, it is important to understand where we've been. Where did the present rule that allegedly false allegations of sexual misconduct may be inquired into on cross-examination and falsity "proven" by extrinsic evidence, all to impeach the credibility of the victim, come from? How did this class of cases get carved out from treatment under the traditional rules of impeachment barring inquiry into specific instances of conduct to attack credibility? The disturbing answer is that the "rule" is rooted in gender bias and mythology.

The "rule's" pedigree is ancient, going back to biblical times, and rooted in men's fear of being falsely accused of rape. D. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?* 7 Yale J.L. & Feminism 243 (1995). It has found one of its most eloquent expressions attributed to Lord Chief Justice Matthew Hale, who wrote that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." *Id.* at note 7. Although expressed in the quaint language of 17th Century England, the notion has enduring currency. As late as 1988, twenty-six states permitted a jury instruction based on Lord Hale's language. A. Thomas Morris, Book Note, "The Empirical, Historical and

Legal Case Against the Cautionary Instruction: A Call for Legislative Reform," 1988 Duke L.J. 154 (1988).

> Indeed, the notion that women will lie about rape or sexual assault for any number of reasons is firmly entrenched in societal attitudes toward women and rape. Whether the motive to lie finds voice in a woman scorned, in the sexually repressed and fantasizing woman who desires to be raped, or in the unchaste woman who seeks to mask her own promiscuity by crying rape, these myths have allowed the focus in rape cases to be placed on the victim's lack of innocence rather than on the guilt of the accused.

Prior False Allegations of Rape, supra, at 243 (footnotes omitted).

Amicus would add to this list the notion put forth by the appellant in this case; that children lie about sexual assault at another's urging, usually the mother's, to gain an advantage in a custody dispute.

But is any of this true? Are women and children prone to inventing allegations of sexual assault to the extent that the rules of evidence should be strained to their breaking? Common experience tells us that rape cases, far from being difficult to defend against, are some of the easiest to defeat. Moreover, the empirical evidence proves that fears of false reporting are grounded in myth and not fact: statistically the false report rate for adult sexual assault is less than 5%, and usually closer to 2%.[9] In cases involving child sexual abuse in the context of divorce or custody cases, the rate of false reporting has been found to be 8%. Arizona Coalition Against Domestic Violence, "Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence," (2003).

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[9] Lynn Hecht Schafran, "Barriers to Credibility: Understanding and Countering Rape Myths", adapted from National Judicial Education Program, *Understanding Sexual Violence: The Judicial Response to Strand and Nonstranger Rape and Sexual Assault;* Lynn Hecht Schafran, *Violence Against Women: Why Empirical Data Must Inform Practice,* from Violence Against Women: Law and Practice (David Frazee, it al eds.)(1998) and Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer,* 66 St. John's Law Review 979 (1993).

B. Michigan's Experience with Rape Mythology

The advent of "rape shield" statutes was a response to this mythology. Rape shield statutes, including Michigan's[10], worked to break the notion that prior instances of sexual conduct were at all relevant to most rape cases. Nevertheless, rape mythology that long predated rape shield laws continued to inform many decisions on the admissibility of such evidence, and never more so when the offered evidence is allegedly false prior allegations of sexual misconduct.

Thus, in *People v. Hackett,* 421 Mich 338; 365 NW2d 120 (1984), this Court in ruling on the Constitutionality of the rape shield statute, said that "the defendant should be permitted to show that the complainant has made false accusations of rape in the past." *Hackett,* 421 Mich at 348. Although it is argued that admission of prior false allegations is constitutionally required, *Hackett* did not say so, and the cases cited in support of the notion are not grounded in the Confrontation Clause of the United States or Michigan Constitution.

In one cited case, *People v. Werner,* 221 Mich 123, 190 NW 652 (1922), the defendant sought to impeach the victim with a diary in which "obscene material" was written in English and German (the victim was a German immigrant with limited English skills). When the victim denied writing the material, the defendant sought to impeach her by asking whether she had admitted to the defendant that she wrote the material. The impeachment was denied, but first the Court noted "[m]uch latitude is allowed in permitting evidence to be introduced which may affect the credibility of a complainant in this class of cases. The fact that she has made similar charges against others may be shown. People v. Evans, 72 Mich. 367, 40 N. W. 473; People v. Wilson, 170 Mich.

[10] MCL 750.520j.

669, 137 N. W. 92, 41 L. R. A. (N. S.) 216. We are impressed, however, that the language of the writing cannot be said to indicate a mania for accusing men of rape, or that it is of a nature to indicate such a morbid condition of mind or body as justified its reception." *Werner,* 221 Mich at 127. The language plainly shows the basis for admitting false allegations is they represent a "mania for accusing men of rape" or "a morbid condition of mind or body" that is unique to women. In other words, allegedly false allegations are proof of the woman's character for credibility, or more accurately, lack of it **in sexual assault cases**.

It is easy to see that the rule allowing cross-examination and proof by extrinsic evidence is of hoary and long standing vintage. *People v. Evans* is a case from 1888. *Wilson,* from 1912, cites a case from 1884.[11] Despite their grey beards, however, the cases still stand on the myth that women are likely to lie about sexual assault, and that in sexual assault cases a special rule allowing cross-examination and proof by extrinsic evidence is compelled.

Justification for this rule is sometimes made by reference to the unique nature of sexual assault cases, where the credibility of the complaining witness is critical to the prosecutor's case. *People v. Mikula,* 84 Mich App 108; 269 N.W.2d 195 (1978). There is no reason for including only rape in this class of cases, unless one buys into the myth of the lying woman. Nearly every case imaginable turns in some degree upon the testimony of a complaining witness. Innumerable examples can be imagined (or pulled from the published case reports) of robberies, assaults, or nearly any other type of crime where only two eye witnesses to the crime, the victim and perpetrator, exist. Yet in rape cases a

[11] *Derwin v. Parsons,* 52 Mich. 425 (1884).

special rule of impeachment has been created that would likely never be applied in any other class of cases.

> Any case can involve a swearing match between two witnesses: an assault in which the defendant and the victim are alone and the defendant threatens the victim with imminent bodily injury; a kidnapping in which the defendant restrains the victim in an isolated location and the victim eventually escapes; an attempted theft in which the defendant and the victim are alone and the defendant grabs the victim's purse but is unable to get it away from the victim. In each of these examples, there is no physical evidence and there are no additional witnesses to the crime. In contrast, although some sex offenses have no corroborating physical evidence, many sex offenses do–such as evidence of victim penetration or traces of the attacker's DNA. So the complainant's and the defendant's credibility are no more critical issues in sex offense cases than in any other type of case.

Lopez v. State, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000)

The grounding of this rule in myth is on full display in *People v. Smallwood,* 306 Mich 49; 10 N.W.2d 303 (1943). In that case, the defendant was convicted of having sex with his 15-year-old daughter. She made the allegations after arguing with the defendant over her wearing a "sun suit" or "gymnasium" suit that in defendant's view was too revealing. The defendant attempted to show at trial that the girl had been in trouble with the juvenile authorities. The trial judge sustained the objection on the basis of a statute that excluded juvenile records in subsequent proceedings.

In a striking fit of candor, the Court acknowledged the laudable purpose of the statute but said:

> However, in the present case there was no effort to impeach the child's character but rather to ascertain her credibility. The question of how far the statute should reach is not new. It has been the subject of comment by the textbook writers. We quote from Wigmore on Evidence, Vol. 1, p. 675: "In charges of rape, incest, etc., where the complainant is a young girl, her credibility may be affected by her unchaste tendencies. False charges of the sort by girls of such tendencies are not uncommon. Unless

> that tendency is inquired into, the story becomes plausible, and many a man has probably gone to the penitentiary as the innocent victim of such tales. The Juvenile Court record of the complainant should unquestionably be admitted; to exclude it is a suppression of means of truth, and is indefensible on any ground; in this aspect these statutes are unscientific and antisocial."
>
> In Vol. 3, p. 460, et seq., supra, quotations are given from many leading authorities showing that errant young girls frequently have psychic complexes that lead them to contrive false charges of sexual offenses by men, resulting sometimes in expressions of imaginary sex incidents of which the narrator is the heroine or the victim. While we agree with the judge that the juvenile records are not admissible, the question asked did not refer to the "disposition of the child" or any evidence given in the case. The question as framed was proper and it should not have been excluded. As was stated in *People v. Cowles*, 246 Mich. 429, 224 N.W. 387, 388: "We think the testimony should have been received, not in extenuation of rape, but for its bearing upon the question of the weight to be accorded the testimony of the girl and the question of whether the mind of the girl was so warped by sexual contemplation and desires as to lead her to accept the imagined as real, or to fabricate a claimed sexual experience."

Smallwood, 306 Mich at 53-54.

The rape shield law was intended to expose and eliminate gender bias of this sort in evidentiary rulings. It is not a special rule of exclusion for a distinct class of victims; rather, it merely reinforces that prior acts of sexual conduct by the victim are irrelevant and their admission invites the jury to judge the victim's *character* based on those acts. When *Hackett* carved out the exception for prior false allegations of rape in rape cases, it did no more than insure that a victim's credibility is attacked by stubborn adherence to rape mythology. The inquiry into prior allegedly false allegations can only be relevant "if one accepts the premise that women have a propensity to make false charges of rape." Johnson, *Prior False Allegations, supra* at 257.

C. False Allegations and the Right to Confrontation

Appellant suggests in his brief that *Hackett* "affirmed a criminal defendant's right, pursuant to the confrontation clause, to a reasonable opportunity to test the truth of a witness against him, including the opportunity to show that the complainant has made a prior false obligations [sic] of sexual abuse." Brief of Appellant at 24. First and foremost, *Hackett* did not find that showing false allegations of rape is constitutionally mandated. Rather, the decision acknowledges that cross-examination on "general credibility" may be constitutionally circumscribed. *Hackett, id.* Conversely, *Hackett* recognized that certain issues, such as inquiry into questions of bias or interest, are protected by the Confrontation Clause. With that amicus bears no grudge. It is with the suggestion that a general attack on credibility by alleging false allegations of rape is constitutionally mandated that amicus argues.

The distinction between general attacks on credibility and attacks on motive, bias or interest of the witness is a crucial one, made clear in *Davis v. Alaska,* 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974):

> One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [] Greene v. McElroy, 360 U.S. 474, 496 (1959).

Davis v. Alaska, 415 U.S. at 317.

The more particular attacks through exposing bias, motive to testify, or interest are afforded more latitude than the general attack on credibility. Like the admission of a prior conviction, evidence of a prior allegedly false allegation of rape is a general attack on credibility inviting the jury to "infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." This general attack is not one which implicates the Constitution.

The distinction was made more clear in a case with remarkable similarities to the case at bar, *Boggs v. Collins,* 226 F3d 728 (CA 6, 2000). In that Ohio rape case, the defendant argued his Right to Confrontation was abridged when he was not allowed to cross-examine the victim on an alleged prior false allegation of rape. As an offer of proof, the defendant was prepared to call a witness named Copas to testify that the victim had accused Rick Yazell of sexually assaulting her one month prior to the assault by Boggs. In addition, the defendant was prepared to call Yazell to testify that he in fact did not rape the victim.

In his *habeas* proceeding Boggs asked the Federal Court to find that the trial court's restriction on cross examination into the allegedly false allegations violated the Constitution. The 6th Circuit disagreed. The decision is worth quoting at length.

> Thus, although *Davis* trumpets the vital role cross-examination can play in casting doubt on a witness's credibility, not all conceivable methods of undermining credibility are constitutionally guaranteed. In particular, the *Davis* Court distinguished between a "general attack" on the credibility of a witness--in which the cross-examiner "intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony"--and a more particular attack on credibility "directed toward revealing possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand." 415 U.S. at 316. The Court, concluding

that "[t]he partiality of a witness . . . is always relevant as discrediting the witness and affecting the weight of the testimony," found this latter type of attack to be part of the constitutionally protected right of cross-examination. *Id.* Faced with a situation where a trial court barred cross-examination bearing on a witness's bias and motive to testify, the Court concluded that the countervailing state interests "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320. In a concurrence, Justice Stewart underscored that the Confrontation Clause was implicated only because Davis was seeking to show bias or prejudice. "[T]he Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination" about past convictions. *Id.* at 321 (Stewart, J., concurring).

In *Van Arsdall*, the Court emphasized that *Davis* and prior decisions recognized that "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.'" 475 U.S. at 678-79 (quoting *Davis*, 415 U.S. at 316-17). It then elaborated that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to *show a prototypical form of bias* on the part of the witness." *Id.* at 680 (emphasis added). The Court therefore criticized the trial court's refusal to allow Van Arsdall to cross-examine a key prosecution witness about the fact that charges of public drunkenness had been dismissed in exchange for his testimony. *See id.* at 679. This limitation foreclosed investigation into an event "that a jury might reasonably have found [to have] furnished the witness a motive for favoring the prosecution in his testimony," and therefore violated the Confrontation Clause. *Id.* Courts after *Davis* and *Van Arsdall* have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence--that cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not. *See Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (finding error in a trial court's refusal to allow cross-examination on a rape victim's extramarital relationship when that relationship would have shown the victim's bias or motivation); *United States v. Abel*, 469 U.S. 45, 56 (1984) (permitting impeachment evidence that a witness was a member of the Aryan Nation, which showed his potential bias against a black defendant); *see also United States v. Stavroff*, 149 F.3d 478, 481 (6th Cir. 1998) (discussing *Davis* and *Van Arsdall* in the context of witness motivation and bias); *Dorsey v. Parke*, 872 F.2d 163, 166 (6th Cir. 1989)(noting that in *Davis* and its progeny, courts have distinguished "between the core values of the confrontation rights and more peripheral concerns which remain within the ambit of the trial judge's discretion").

When faced with alleged prior false accusations of rape, federal courts have adhered to the fine line drawn in *Davis* and *Van Arsdall*, finding cross-examination constitutionally compelled when it reveals witness bias or prejudice, but not when it is aimed solely to diminish a witness's general credibility. In *Hughes v. Raines*, 641 F.2d 790 (9th Cir. 1981), the trial court refused to allow defense counsel to cross-examine an alleged rape victim about an alleged prior false accusation of rape. The Ninth Circuit relied on the distinction drawn in *Davis* "between an attack on the general credibility of the witness and a more particular attack on credibility" through revealing biases, prejudices or ulterior motives. *Id.* at 793. Looking closely at the defendant's purpose for introducing the testimony, the Court found that the defense was simply asking the jury to make an inference "that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false." *Id.* In other words, the intended cross-examination "was not to establish bias against the defendant or for the prosecution; it merely would have been to attack the general credibility of the witness on the basis of an unrelated prior incident." *Id.* Under *Davis*, the *Hughes* Court concluded, limiting cross-examination for that purpose did not violate the Confrontation Clause. *See id.* at 793.

Similarly, in *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988), a rape defendant challenged as unconstitutional the district court's refusal to admit evidence of a victim's alleged prior false accusation of rape. Like the Ninth Circuit, the Eighth Circuit noted the distinction between cross-examination regarding a witness/accuser's possible biases, prejudices or ulterior motives and cross-examination and evidence introduced simply to attack her general credibility. *See id.* at 1088-89. The court found that the latter purpose--and the inference that "because the victim made a false accusation in the past, the instant accusation is also false," *id.* at 1089--fell below the Sixth Amendment threshold. Because in the case before it, "the evidence of the alleged prior false accusation of rape was offered solely to attack the general credibility of" the victim, the district court's refusal to allow the attempted cross-examination did not violate Bartlett's confrontation rights. *Id.* Other courts have echoed the reasoning from *Hughes* and *Bartlett*. *See, e.g.*, *Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996) (noting that *Davis* and other cases did not suggest that "the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems"); *United States v. Berkley*, No. 96-4181, 1997 WL 657007, at *2 (4th Cir. 1997) (unpublished opinion) (finding that alleged prior false accusation had little relevance "to the accuser's credibility or veracity respecting the charge being prosecuted"); *Rowan v. Kernan*, No. C95-01290, 1995 WL 674904, at *1 (N.D. Cal. 1995) (unpublished opinion) (reading *Davis* and *Van Arsdall* to say that while the constitution protects cross-examination if it concerns bias, motive or prejudice, "general attacks on the credibility of

> a witness do not raise the constitutional concerns which the confrontation clause addresses"); Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 141 (1998) (noting that whether an alleged false accusation of rape must be admitted under the Confrontation Clause turns on the distinction between proving bias or prejudice and proving general credibility).

Boggs, id. at 736-738.

Although the appellant mentions bias, motive, intent and plan or system, Brief of Appellant p. 27, the real purpose for the cross-examination is an attack on credibility, as is made clear by the Court of Appeals in its decision citing *People v. Williams,* 191 Mich App 269; 477 NW2d 877 (1991). As such, the Confrontation Clause is not implicated, never mind violated, by the trial court's refusal to allow the cross-examination.

D. False Allegations , MRE 608 and Rape Shield

How, then, should courts determine whether to admit allegedly false accusations as general attacks on character? There exists already a means to determine the admissibility of evidence of character for truthfulness. The problem is not in the rules, but rather in how *Hackett* is read to permit inquiry into allegedly false allegations and the admission of extrinsic proof apart from the rules. Properly understood as character evidence, its admission should be governed by MRE 608 with its limitation on inquiry and proof by extrinsic evidence.

MRE 608(b) provides that a witness may be cross-examined on specific instances of conduct if the court first finds that the acts are probative of the witness's character for truthfulness or untruthfulness. However, extrinsic evidence to prove the prior act is not allowed; the cross-examiner must take the witness's answer. In a case of allegedly false prior allegations, the cross-examiner may ask "Isn't it true you falsely accused another of

rape?" If the witness denies she made the allegation, the inquiry ends there. The cross-examiner may not call a witness or submit documentary evidence to contradict the denial.

It cannot be gainsaid that most every allegedly false allegation of rape will never get to the cross-examination stage. The court must determine first, that it is probative of character for truthfulness or untruthfulness; and, second, that the allegation was made and that it was false. It is here that the provisions of MCL 750.520j and the Rule of Evidence intersect.

The provisions of the rape shield law do not neatly fit allegedly false allegations. Such allegations have relevancy only to the extent that they are truly false. If they are true, the evidence is properly characterized as past sexual conduct, albeit non-consensual conduct. However, if the allegations are actually false, then the evidence is not of past sexual conduct but the absence of such conduct. Even so, the policy considerations behind the passage of MCL 750.520j are the same and a similar means of testing the relevance and admissibility should be in place. One need only look to the recent Kobe Bryant experience to see that a lengthy hearing at which witnesses are called to allege prior false accusations, and presumably witnesses to rebut that the allegations were made or if made are false, creates for the victim the same problems – loss of privacy, being placed on trial as a crime victim, the trauma of reliving past rapes, and the resultant reluctance to report any rape- that the rape shield law tried to prevent. For this reason, while the allegations may fall outside the neat purview of the rape shield law, the same rules concerning notice, offer of proof, and in camera hearings ought to be provided. This is not as startling a suggestion as it may seem at first blush. Other jurisdictions have

used the procedures from rape shield statutes in this way, most notably, *Graham v. State,* 736 N.E.2d 822 (Ind. Ct. App. 2000).

The procedure which amicus suggests is this: that the defendant's notice of intent to inquire by cross-examination into prior allegedly false allegations must be sent in accord with MCL 750.520j (2). The notice must be accompanied by an offer of proof by affidavit or otherwise of the allegations and how they are false.

Moreover, the defendant's notice and offer of proof must demonstrate how the prior false allegations are actually probative of character for untruthfulness[12]. The focus on the initial inquiry is not on the falsity of the allegations, lest the court confuse falsity with probative value. "When evidence is admitted in this manner, the only nexus between the prior accusations and the current rape is that both charges concern sexual assault. This is insufficient evidence of context to show that the victim has a propensity to lie about rape." Johnson, *Prior False Allegations, supra* at 268. The focus at this stage is whether the proffered evidence is probative of character for untruthfulness, assuming that prior allegations of sexual misconduct were made and that they are false.

> The probative value of the evidence is weak if it is doubtful that the alleged past events actually occurred. But even where there is no doubt as to their occurrence, the circumstances may be so different that they can have no bearing on the witness's veracity in the current case. Thus, even if the evidence showed that the witness made a false statement in the past, there must be a sufficient nexus between that statement and the current charge.

Johnson, *Prior False Allegations, supra* at 627.
It is here that most proffers will fail. An analysis of the probative value will reveal that most allegedly false allegations are not probative of character for untruthfulness but rather rely on the "she lied once, she's lying again" tautology.

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[12] The defendant may demonstrate that the evidence is offered for a noncharacter purpose that does not implicate MRE 608. See, generally, the discussion in C. above.

Only if the proponent of the evidence can overcome this high burden should the court hold an in camera hearing. The issue at the hearing is primarily whether the proponent can prove that the allegations were actually false. To what burden should that proof be held? The burden should be a difficult one because of the danger of misuse of such character evidence:

> The principal danger of character evidence is that it takes on an importance to the jury that may be disproportionate to its actual probative value, thereby prompting an improper decision. Psychological studies show that jurors infer that character evidence can be used to accurately predict behavior, but that this inference itself is doubtful. When rape mythology is added to the questionable proposition that behavior can be predicted by prior acts, the danger increases that the jurors will give disproportionate weight to the character evidence. The admission of such evidence is likely to give vent to the myth of the lying woman/innocent man on the part of the jury. As a result, the jurors may structure their beliefs in accordance with their preconceived ideas, rather than the actual events of the case. These risks are present whether or not extrinsic evidence is allowed, but if the inquiry moves beyond cross-examination, the danger is that they will rise to an unreasonable level.

Johnson, *Prior False Allegations, supra*, at 273. Using the traditional "reasonable basis" test for cross-examination would eviscerate the necessary protections afforded by MRE 608 and the rape shield law; the cross-examination would be allowed in more cases than it is presently. An appropriate burden, and one applied in other jurisdictions, *see, Graham v. State,* 736 N.E.2d 822 (Ind. Ct. App. 2000), is that the proponent of the evidence must show that the allegations were "demonstrably false." An allegation is not "demonstrably false" if it is merely contradicted by some witness (usually, as here, the one against whom the prior accusation was made), or was reported to authorities but not charged[13], or if charged and tried the defendant was acquitted. [14] "Demonstrably false"

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[13] Rape is an underreported and undercharged crime. The propensity of law enforcement and prosecuting officials to refuse to investigate and charge rape cases has been well documented. "F.B.I. crime statistics show that rape has the highest percentage of "unfounded" complaints. 1993 FBI Uniform Crime Reports for

can mean only two things: that the proponent can produce evidence that the allegation was a physical impossibility or that the victim, in the in camera hearing, admits to making the allegation and admits to its falsity[15].

If the proponent of the evidence can sufficiently show that the evidence is probative of character for untruthfulness, and it meets the balancing test of MRE 403, and that the prior allegations were made and are demonstrably false, the proponent will be allowed to cross-examine the victim. Even so, MRE 608(b)'s proscription on proof by extrinsic evidence still holds; the defendant is left to accept the victim's answer.

E. Admission Under the Appropriate Standard and Harmless Error

The evidence offered in this case fails the test. The defendant consistently failed to present any coherent theory for the admission of the allegedly false allegations until the eve of trial, and then offered them as a general attack on credibility. No appropriate notice or offer of proof was given. Even if we accept defense counsel's statements about the nature of his proof that false allegations were made, the tests are failed. "Demonstrably false" cannot mean that the one allegedly accused will deny the accusations. Moreover, it is unclear whether the appellant can prove that the prior accusations were even made. Under these circumstance, it is not error to prohibit the proffered cross-examination and extrinsic proof.

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the United States 24. Of all attempted rapes, only 52.5% were actually reported to the police. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Victimization in the United States 102 (1992)." Johnson, supra, note 166.

[14] See, generally, 71 A.L.R.4th 469 for case citations.

[15] Care should be taken in assessing a victim's recantation. There can be many reasons why the recantation, and not the allegation, is false.

Even if error, the error was harmless. In this regard, amicus adopts the able argument of the People of the State of Michigan.

RELIEF REQUESTED

Wherefore, amicus Prosecuting Attorneys Association of Michigan respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully Submitted,
Ronald Frantz (P27214)
President, Prosecuting Attorneys
Association of Michigan

August 30, 2005

By: _____
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